1998

State of Utah v. Clark Roy Friesen : Brief of Appellee

Utah Court of Appeals

IN THE COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Appellant,	:	Case No. 981540-CA
	:	
vs.	:	
	:	Category No. 2
CLARK ROY FRIESEN,	:	
	:	
Defendant-Appellee.	:	

BRIEF OF DEFENDANT-APPELLEE

APPEAL FROM AN ORDER DISMISSING ONE COUNT OF POSSESSION MARIJUANA WITH INTENT TO DISTRIBUTE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(iv)(1996), IN THE FOURTH JUDICIAL DISTRICT COURT, JUAB COUNTY, THE HONORABLE RAY M. HARDING, PRESIDING

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BRIEF OF DEFENDANT-APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

The State has appealed from an Order of Dismissal in a prosecution for Possession of Marijuana with Intent to Distribute, a Third Degree Felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (1996), following the granting of Appellee's Motion to Suppress Evidence.

The appeal is not properly before this court for two reasons. First, the Order of Dismissal of the Information in this case did not state that the dismissal was with prejudice as required by *State v. Troyer,* 866 P.2d 528 (Utah 1993). Second, the trial Court did not certify that the evidence suppressed substantially impaired the prosecution's case as required by the Utah Supreme Court's ruling in *Troyer.*

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Does the State have the right to appeal where the order of dismissal does not provide that the dismissal is with prejudice and the trial court has made no finding or certification that the state's case is substantially impaired by the suppression of the evidence?

2. Is the State prohibited from raising the issue of alternative justification for the traffic stop and detention of Defendant where the issue and argument was not raised at the trial Court level?

3. Did the trial Court clearly err in finding that Trooper Wilson made an illegal stop of Defendant's vehicle where the Trooper did not know in fact, whether or not Defendant was violating the law of Wyoming.

The trial Court's findings of fact are subject to a "clearly erroneous" standard of review and are reviewed deferentially. Conclusions of law are subject to review for "correctness."

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, RULES, ETC.

IV AMENDMENT TO U.S. CONSTITUTION

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE IV SECTION 1 Privileges and immunities U.S. CONSTITUTION

> [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.C.A. § 41-1a-1305(5)

> (5) to operate upon any highway of this state any vehicle required by law to be registered without having the license plate or plates securely attached, and the registration card issued by the division carried in the vehicle, except that the registration card issued by the division to all trailers and semitrailers shall be carried in the towing vehicle;

STATEMENT OF THE CASE

Defendant was charged with Possession of Marijuana with Intent to Distribute, a Third Degree Felony. Defendant filed a Motion to Suppress evidence seized pursuant to a warrantless search of his vehicle. Following an evidentiary hearing, the trial Court granted Defendant's motion. The Court denied Plaintiff's Motion to Reconsider. The trial Court entered a dismissal without designating the dismissal to be "with prejudice" and did not make any findings or certification that the granting of the suppression motion substantially impaired the ability of the state to proceed with the prosecution. (R. 68-70)

STATEMENT OF FACTS

On October 20, 1997, Defendant was operating a vehicle validly licensed in the state of Wyoming. As he proceeded northbound approaching Nephi, Utah, Utah Highway Trooper Charlie Wilson was observing traffic and noticed that Defendant's vehicle did not have a front license plate displayed. The trooper testified that the sole reason he stopped the vehicle with his overhead lights was that there was no front license plate displayed because Utah issues two plates. (75. 19) The trooper further testified that once he got behind the vehicle he saw that it was a Wyoming vehicle and that he did not know whether or not failure

to display a Wyoming plate was a violation of Wyoming law. (75. 19-22) Trooper Wilson stated that as he approached the rear of the vehicle he determined that the rear plate was current. (75. 26) He testified that he thought the vehicle might be stolen because it did not display a front plate. (R. 75. 26)

The trooper admitted that once he approached the vehicle, prior to any contact with the driver, he saw that the vehicle had a damaged front bumper and noticed the front plate on the dashboard. The trooper then testified that once he became aware that the vehicle in fact had two plates, his purpose for further detention was to see if the driver had a valid driver's license. (75. 24)

Following an evidentiary hearing, the trial court entered a Memorandum Decision (a copy the Memorandum Decision is attached hereto as Addendum A), finding that the officer's stop on the basis of the out-of-state vehicle not displaying a front licence plate did not amount to a reasonable suspicion that the driver was committing a crime since the officer observed a Wyoming rear plate before he stopped the vehicle and only "assumed" that Wyoming required a front plate be displayed.

The State filed a motion for reconsideration based upon a stipulation by the parties that Wyoming does issue and require display of a front plate. The Court issued a second Memorandum Decision (a copy of the second Memorandum Decision is attached hereto as Addendum B). The Court determined that it did not matter whether or not Wyoming was one of those states which required the display of a front license plate since the officer assumed and did not know that fact at the time he stopped the motorist Defendant.

Upon motion by the State, the Court entered an Order of Dismissal (a copy of which is attached hereto as Addendum C) dismissing the Information against Defendant, but not with prejudice.

SUMMARY OF THE ARGUMENT

The appeal of the State from the ruling of the Court is improper since the State has a limited right to appeal governed by the conditions set forth in *State v. Troyer,* 866 P. 2d 528 (Utah 1993), requiring that the trial Court certify that the suppression of evidence substantially impairs the prosecution's case, and the dismissal is with prejudice. In the present case, the dismissal of the Court did not state that it was with prejudice and there was no certification or finding by the Court that the prosecution's case was substantially impaired by the suppression of evidence.

The State argues on appeal that although the the facts support the finding of the trial Court that the trooper's stop based upon the lack of a front license plate on Defendant's vehicle did not justify the stop, the Court should have considered an alternative basis for the trooper's stop, i.e., that the vehicle may have been stolen. However, that argument was not raised in the State's memorandum or in any argument submitted to the trial court. The State has raised the issue for the first time in this appeal. This Court should not consider an issue not raised during argument nor briefing at the trial Court level.

The trial Court found from the evidence that the trooper did not know that Wyoming was one of those states which required a front license plate to be displayed. The Court ruled that the trooper did not have a reasonable articulable suspicion to stop the vehicle and that

the stop was unjustified. "The factual findings of the trial court underlying a trial court's decision to grant or deny a motion to suppress evidence are reviewed under the deferential clearly-erroneous standard, [but] the legal conclusions are reviewed for correctness, with a measure of discretion given to the trial judge's application of the legal standard to the facts." *State v. Moreno,* 910 P. 2d 1245, at 1247 (Utah Ct. App.) *cert. Denied,* 916 P. 2d 909 (Utah 1996). The findings of the Court were not clearly erroneous and the resulting decision was correct.

ARGUMENT

POINT I

THE APPEAL OF THE STATE IN THIS CASE IS IMPROPER SINCE THE REQUIREMENTS OF *TROYER* WERE NOT MET.

The appeal of the State from the ruling of the Court is improper since the State has a limited right to appeal governed by the conditions set forth in *State v. Troyer,* 866 P.2d 528 (Utah 1993), requiring that the trial Court certify that the suppression of evidence substantially impairs the prosecution's case, and the dismissal is with prejudice.

In *Troyer, supra,* at 866 P.2d 531, the Court stated the following:

> We will therefore review suppression orders on appeal from a dismissal only where the trial court certifies that the evidence suppressed substantially impairs the prosecution's case.
>
> Second, as a further safeguard, we will require the State to request dismissal with prejudice to obtain review of suppression orders on an appeal of right from a dismissal. In other words, if the orders are not affirmed on appeal, the State may not refile the charges.
>
> ..... Hereafter, trial court certification as explained above will be required

before the State may appeal and seek review of suppression orders after dismissal.

In the present case, the dismissal of the Court did not state that it was with prejudice and there was no certification or finding by the Court that the prosecution's case was substantially impaired by the suppression of evidence. The Order of Dismissal of the Court provided simply: "Based upon the foregoing Motion and good cause appearing therefore, the Court hereby dismisses the above case." See also *State v. Giron,* 943 P.2d 1114 (Utah App. 1997).

The motion of the State requesting dismissal did allege that the Order of Suppression impaired the prosecution of the case and did request the dismissal with prejudice; however, the Order (drafted by the State) did not set forth any certification or findings addressing that issue nor did the dismissal state it to be with prejudice. Under Rule 41 of the Utah Rules of Civil Procedure, a voluntary dismissal by Plaintiff is without prejudice unless otherwise specified in the order. See *Career Service Review Bd. v. Utah Dept. Of Corrections,* 942 P.2d 933. The appeal should be dismissed for lack of compliance with the conditions set by the appellate courts for a prosecution appeal.

POINT II

APPELLANT FAILED TO RAISE THE ISSUE OF THE OFFICER'S REASONABLE SUSPICION TO STOP THE VEHICLE FOR REASONS OTHER THAN THE FAILURE TO DISPLAY A FRONT LICENSE PLATE DURING ARGUMENT OR BRIEFING AT THE TRIAL COURT LEVEL AND HAS THEREFORE WAIVED THAT ARGUMENT ON APPEAL

While admitting that the trial Court's finding is supported by trooper Wilson's

testimony, the State now argues that the Court "narrowly" focused on the trooper's assumption that the vehicle was being operated in violation of Wyoming law while overlooking the possibility that the trooper had other suspicion to justify the stop. The reason the decision of the trial Court did not address this argument is that it was never raised below. The parties briefed the issues and submitted written memoranda and argument. The State's Memorandum is attached as Addendum B to the Appellant's brief. The factual account in the Memorandum does not contain any reference to any other reason for stopping the vehicle other than no front plate. The argument of the State that the officer had reasonable suspicion to stop the vehicle does not mention any other reason in addition to the no front plate and argued that "Trooper Wilson pulled Defendant over because Defendant was violating Utah law which required that vehicles registered in Wyoming must have front plates in Utah based upon § 41-1a-1305(5) and § 41-1a-404."

Nor did the State raise the issue in the Motion for Reconsideration of Suppression and to Supplement the Record. The trial Court cannot be expected to consider arguments which are not presented to the Court and to opposing counsel.

In *State v. Chapman,* 921 P.2d 446 (Utah 1995), the appellate Court held that arguments and issues not raised at the trial Court level could not be raised for the first time on appeal. See also *State v. Webb,* 790 P.2d 65 (Ct. App. 1990). The State should not be able to raise issues of justification for the stop which were not argued below.

POINT III

THE FACTUAL FINDING OF THE TRIAL COURT THAT THE TRAFFIC STOP OF DEFENDANT'S VEHICLE WAS UNJUSTIFIED IS SUPPORTED BY THE EVIDENCE AND IS CORRECT

The trial Court found from the evidence that the trooper did not know that Wyoming was one of those states which required a front license plate to be displayed. This finding is clearly supported by the record in this case. The trooper testified that he assumed that not displaying a front license plate violated Wyoming's law but that he did not know. (75. 21-22) Further, the trooper testified that the only basis for his suspicion that the vehicle might be stolen was that there was no front plate on the vehicle. (75. 27) The totality of the record demonstrates that the reason the vehicle was stopped was because of the failure to display a front plate. There was nothing other than that fact upon which the trooper based any suspicion that the vehicle may have be a stolen vehicle. In addition, the trooper testified that he drove up past the vehicle and saw that the front bumper and grill had been damaged in the area where the front license plate would be displayed. (75. 5) Then as he approached the vehicle, he observed the front plate on the dashboard. (75. 5, 25)

Further, the position of the trooper was that even though he was aware that there are states which do not require the display of a front plate, he considered it within his authority to stop any vehicle not complying with Utah registration requirements. (R.75 22-23)

In *State v. Tetmey,* 947 P.2d 1157 (1997), the appellate Court found the officer's stop of a vehicle based upon the officer's observations of the driver and his passenger which led the officer to conclude the driver may have been driving impaired. The Court found that an

innocent explanation could easily be given for each of the observations of the officer upon which he based his suspicion. At 947 P.2d 1160, the Court observed:

> We hold that, taken together, these four articulated circumstances do not provide reasonable suspicion that defendant was driving while under the influence. Instead, these circumstances "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were [we] to conclude that as little foundation as there was in this case could justify a seizure." *Reid v. Georgia,* 448 U.S. 438, 441, 100 S.Ct. 2752, 2754, 65 L.Ed.2d 890 (1980).

A Utah case which has more than passing similarities to the present case is that of *State v. Baird,* 763 P.2d 1214 (Ct. App. 1988). In *Baird,* Trooper Mangelson of the Utah Highway Patrol, stopped an Arizona vehicle which was northbound in the area of Nephi, Utah, because the sticker on the rear license plate did not appear to be valid. Although the trooper admitted he was unaware of the Arizona color scheme for stickers, he followed the car to determine if the year was valid. After stopping the car, the trooper determined that the year was in fact valid. After stopping the vehicle and determining that the plate was current, the trooper made other observations which the State attempted to use to justify the stop such as the vehicle had new tire and shocks, a twisted off gas cap, a jack in the back seat, the defendant's confusion about ownership, and the smell of marijuana. The appellate Court rejected this reasoning, stating:

> While this may have justified a further inquiry of the driver after a valid stop, such articulable suspicion must be present at the time of the stop and must be the reason for the stop. In this case, no reasonable or articulable suspicion existed to justify the stop. The evidence used to convict defendant was derived by exploitation of the impermissible stop. 763 P.2d at 1217.

Of particular interest is footnote 1 to the decision concerning to the reason for the

stop. Footnote 1 observes: "If this is sufficient reason to stop, every out-of-state vehicle may be stopped for no other reason other than the officer's ignorance of the license plate sticker color code." 763 P.2d at 1217.

The same observation applies to the present case. If not displaying a front license plate is sufficient cause to stop an out-of-state vehicle, then any such vehicle may be stopped for no other reason than the officer's ignorance of the vehicle registration requirements of the state in which the vehicle is registered. Under a totality of the circumstances analysis, the trooper's concern became substantially diluted once he saw the damaged area on the front bumper and grill since there would be an obviously innocent explanation of the reason there was no front plate. Further, when, as the trooper approached the vehicle, he saw the front plate on the dashboard, that fact would further dilute any suspicion that the officer might otherwise have based upon the failure to display a front plate.

The Court ruled that the trooper did not have a reasonable articulable suspicion to stop the vehicle and that the stop was unjustified. "The factual findings of the trial court underlying a trial courts decision to grant or deny a motion to suppress evidence are reviewed under the deferential clearly-erroneous standard, [but] the legal conclusions are reviewed for correctness, with a measure of discretion given to the trial judge's application of the legal standard to the facts." *State v. Moreno,* 910 P. 2d 1245, at 1247 (Utah Ct. App.) *cert. Denied,* 916 P. 2d 909 (Utah 1996). The record clearly supports the ruling of the trial Court.

CONCLUSION

The appeal of the State should be dismissed for failure to meet the requirements of

Troyer. The argument of the State concerning alternative basis to justify the traffic stop and detention of Defendant cannot be considered as that argument and issue was not raised below. The factual findings of the trial Court determining that the stop for no front license plate to be unjustified is supported by the facts and admitted by the State in its brief. The ruling of the trial Court suppressing the evidence should be upheld.

RESPECTFULLY SUBMITTED this 15th day of March, 1999.

ALDRICH, NELSON, WEIGHT & ESPLIN

MICHAEL D. ESPLIN
Attorney for Defendant-Appellee

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, this 15th day of March, 1999, two copies of the foregoing Brief of Defendant-Appellee to the following:

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Assistant Attorney General
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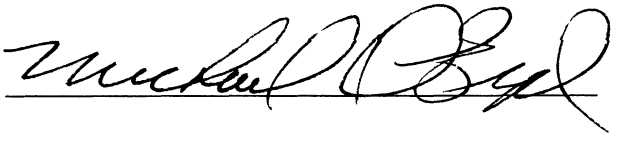

ADDENDUM

U.S. Constitution, IV Amendment

U.S. Constitution, Article IV Section 1, Privileges and immunities

Utah Code Ann. § 41-1a-404.

Utah Code Ann. § 41-1a-1305(5)

Utah Code Ann. § 58-37-8(1)(a)(iv) (1996)

Utah Rules of Civil Procedure, Rule 41

Addendum A - Memorandum Decision (June 2, 1998)

Addendum B - Memorandum Decision (August 18, 1998)

Addendum C - Motion and Order of Dismissal

IV AMENDMENT TO U.S. CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE IV SECTION 1 Privileges and immunities U.S. CONSTITUTION

[1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.C.A. § 41-1a-1305(5)

(5) to operate upon any highway of this state any vehicle required by law to be registered without having the license plate or plates securely attached, and the registration card issued by the division carried in the vehicle, except that the registration card issued by the division to all trailers and semitrailers shall be carried in the towing vehicle;

shall notify the division and surrender the registration card and license plate of the withdrawn vehicle.

(11) (a) An out-of-state carrier with an apportionally registered vehicle who has not presented a certificate of property tax or in lieu fee as required by Section 41-1a-206 or 41-1a-207, shall pay, at the time of registration, a proportional part of an equalized highway use tax computed as follows:

(i) Multiply the number of vehicles or combination vehicles registered in each weight class by the equivalent tax figure from the following tables:

Vehicle or Combination Registered Weight	Age of Vehicle	Equivalent Tax
12,000 pounds or less	12 or more years	$10
12,000 pounds or less	9 or more years but less than 12 years	$50
12,000 pounds or less	6 or more years but less than 9 years	$80
12,000 pounds or less	3 or more years but less than 6 years	$110
12,000 pounds or less	Less than 3 years	$150

Vehicle or Combination Registered Weight	Equivalent Tax
12,001 — 18,000 pounds	$150
18,001 — 34,000 pounds	200
34,001 — 48,000 pounds	300
48,001 — 64,000 pounds	450
64,001 pounds and over	600

(ii) Multiply the equivalent tax value for the total fleet determined under Subsection (11)(a)(i) by the fraction computed under Subsection (3) for the apportioned fleet for the registration year.

(b) Fees shall be assessed as provided in Section 41-1a-1207.

(12) (a) Commercial vehicles meeting the registration requirements of another jurisdiction may, as an alternative to full or apportioned registration, secure a temporary registration permit for a period not to exceed 96 hours or until they leave the state, whichever is less, for a fee of $20 for a single unit and $40 for multiple units.

(b) A state temporary permit or registration fee is not required from nonresident owners or operators of vehicles or combination of vehicles having a gross laden weight of 26,000 pounds or less for each single unit or combination. 1998

41-1a-302. Repealed. 1996

PART 4

LICENSE PLATES AND REGISTRATION INDICIA

41-1a-401. License plates — Number of plates — Reflectorization — Indicia of registration in lieu of or used with plates.

(1) (a) The division upon registering a vehicle shall issue to the owner one license plate for a motorcycle, trailer, or semitrailer, and two identical license plates for every other vehicle.

(b) The license plate shall be issued for the particular vehicle registered and may not be removed during the term for which the license plate is issued or used upon any other vehicle than the registered vehicle.

(2) The division may receive applications for registration renewal, renew registration, and issue new license plates or decals at any time prior to the expiration of registration.

(3) (a) All license plates to be manufactured and issued by the division shall be treated with a fully reflective material on the plate face that provides effective and dependable reflective brightness during the service period of the license plate.

(b) The division shall prescribe all license plate material specifications and establish and implement procedures for conforming to the specifications

(c) The specifications for the materials used such as the aluminum plate substrate, the reflective sheeting, and glue shall be drawn in a manner so that at least two manufacturers may qualify as suppliers

(d) The granting of contracts for the materials shall be by public bid.

(4) (a) The commission may issue, adopt, and require the use of indicia of registration it considers advisable in lieu of or in conjunction with license plates as provided in this part.

(b) All provisions of this part relative to license plates apply to these indicia of registration, so far as the provisions are applicable. 1992

41-1a-402. Required colors, numerals, and letters — Expiration.

(1) Except as provided in Subsection (3), each license plate shall be in colors selected by the commission and shall have displayed on it:

(a) the registration number assigned to the vehicle for which it is issued;

(b) the name of the state;

(c) a designation of the county in which the vehicle is registered as provided in Section 41-1a-406;

(d) the date of expiration; and

(e) a slogan determined as provided in Section 41-1a-405.

(2) If registration is extended by affixing a validation decal to the license plate, the expiration date of the decal governs the expiration date of the license plate.

(3) Beginning July 1, 1997, each original license plate that is not one of the special group license plates issued under Section 41-1a-408 shall be a:

(a) statehood centennial license plate with the same color, design, and slogan as the plates issued in conjunction with the statehood centennial; or

(b) Ski Utah license plate. 1997

41-1a-403. Plates to be legible from 100 feet.

License plates and the required letters and numerals on them, except the decals and the slogan, shall be of sufficient size to be plainly readable from a distance of 100 feet during daylight. 1992

41-1a-404. Location and position of plates.

(1) License plates issued for a vehicle other than a motorcycle, trailer, or semitrailer shall be attached to the vehicle, one in the front and the other in the rear.

(2) The license plate issued for a motorcycle, trailer, or semitrailer shall be attached to the rear of the motorcycle, trailer, or semitrailer.

(3) Every license plate shall at all times be:

(a) securely fastened:

(i) in a horizontal position to the vehicle for which it is issued to prevent the plate from swinging;

(ii) at a height of not less than 12 inches from the ground, measuring from the bottom of the plate; and

(iii) in a place and position to be clearly visible; and

(b) maintained:

(i) free from foreign materials; and

(ii) in a condition to be clearly legible. 1992

58-37-8. Prohibited acts — Penalties.

(1) Prohibited acts A — Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II or a controlled substance analog is guilty of a second degree felony and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B — Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a controlled substance analog, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b).

(d) Upon a second or subsequent conviction of possession of any controlled substance by a person, that person shall be sentenced to a one degree greater penalty than provided in this subsection.

(e) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (2)(a)(iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(3) Prohibited acts C — Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

(4) Prohibited acts D — Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under

Rule 39. Trial by jury or by the court.

(a) *By jury.* When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or

(2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist, or

(3) Either party to the issue fails to appear at the trial

(b) *By the court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) *Advisory jury and trial by consent.* In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Rule 40. Assignment of cases for trial; continuance.

(a) *Order and precedence.* The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts may deem expedient. Precedence shall be given to actions entitled thereto by statute.

(b) *Postponement of the trial.* Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

(c) *Taking testimony of witnesses present.* If required by the adverse party, the court shall, as a condition to such postponement, proceed to have the testimony of any witness present taken, in the same manner as if at the trial; and the testimony so taken may be read on the trial with the same effect, and subject to the same objections that may be made with respect to a deposition under the provisions of Rule 32(c)(1) and (2) [Rule 32(c)(3)(A) and (B)].

Rule 41. Dismissal of actions.

(a) *Voluntary dismissal; effect thereof.*

(1) *By plaintiff.* Subject to the provisions of Rule 23(e), of Rule 66(i), and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By order of court.* Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on:

(i) a stipulation of all of the parties who have appeared in the action; or

(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary dismissal; effect thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) *Dismissal of counterclaim, cross-claim, or third-party claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) *Costs of previously-dismissed action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) *Bond or undertaking to be delivered to adverse party.* Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

Rule 42. Consolidation; separate trials.

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) *Separate trials.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any

ADDENDUM A

MEMORANDUM DECISION (June 2, 1998)

A

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. CLARK ROY FRIESEN, Defendant.	MEMORANDUM DECISION CASE NO. 971400205 DATE: June 2, 1998 JUDGE: RAY M. HARDING DEPUTY CLERK: Georgia Snyder LAW CLERK: David Sturgill

This matter came before the Court upon Defendant's Motion to Suppress. Having received and considered the Motion and a supporting memorandum, the Court hereby grants the Motion and delivers the following Memorandum Decision.

Statement of Facts

On or about October 20, 1997, UHP officer Charlie Wilson observed Defendant traveling northbound on I-15. The officer noticed Defendant's vehicle did not have a front license plate, and decided to pull Defendant over. Before the officer signaled to Defendant to stop, he observed a Wyoming license plate displayed on the rear bumper of Defendant's vehicle.

The officer testified at the preliminary hearing that the only reason he stopped Defendant was because of the missing front plate. He testified that he knew some states did not require a front license plate, but was not sure of the Wyoming requirement. The officer testified that he "assumed" Wyoming required two license plates since he had seen other Wyoming cars display both front and rear plates.

The officer made contact with Defendant and was provided a valid driver's license and vehicle registration. At that point, the officer testified that he detected the odor of marijuana. The officer asked Defendant for consent to search his vehicle, to which Defendant reluctantly responded "if you have to." The search eventually produced a 12 pound bag of marijuana.

Opinion of the Court

The Fourth Amendment to the United States Constitution provides: "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated [.]" U.S. CONST. amend IV; *see also* UTAH CONST. art. I, § 12. The concern of the Fourth Amendment is against "unreasonable" or unjustified searches and seizures--"reasonable" searches and seizures are constitutionally valid. Although the expectation of privacy in a vehicle is less than that of a home, "one does not lose the protection of the Fourth Amendment while in an automobile." State v. Schlosser, 774 P.2d 1132, 1135 (Utah 1989).

In Utah, a peace officer may stop and question a person, without violating the Fourth Amendment, "when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." State v. Pena, 869 P.2d 932, 940 (Utah 1994) (*quoting* United States v. Place, 462 U.S. 696, 702-03 (1983)).

In this case, Officer Wilson testified at the preliminary hearing that the only reason he stopped Defendant was because of the missing front license plate. He admitted that he wasn't sure whether vehicles registered in Wyoming were required to display front plates. He "assumed" they were because he had observed other Wyoming vehicles with front plates. The officer's "assumption" does not support a reasonable suspicion that Defendant was engaged in criminal activity. A number of lawful reasons could have existed to explain the absence of a front plate--one being that Wyoming law does not require them.

The State cites Utah Code Annotated § 41-1A-1305. That section provides that it is a Class "C" Misdemeanor for any person to "operate on any highway of this state any vehicle required by law to be registered without having license plates or plate securely attached." The State argues that the statute does not exempt vehicles licensed in other jurisdictions. Assuming the State's interpretation of the statute is correct, that does not cure the officer's "assumption" of Wyoming's license plate requirement. The officer noticed Defendant's vehicle was registered in Wyoming before he pulled him over. At that time, the officer did not know whether Wyoming vehicles were required to display both front and rear license plates. Clearly, the officer cannot enforce a law that he merely "assumed" existed. Officer Wilson should have discontinued his pursuit of Defendant and allowed him to proceed without interruption.

The State claims "[c]learly the faint smell of marijuana gives rise to a reasonable suspicion that there was marijuana in the car[.]" While this may have justified a further inquiry of the driver after a valid stop, such articulable suspicion must be present at the time of the stop and must be the reason for the stop. In this case, no reasonable or articulable suspicion existed to justify the stop. Furthermore, the unjustified stop negates any subsequent consent to search Defendant's vehicle.

The bag of marijuana discovered in Defendant's vehicle was derived by exploitation of an impermissible stop. Because none of the exceptions to the exclusionary rule apply, the evidence will be suppressed.

Order

Accordingly, the defendant's Motion to Suppress is hereby granted.

DATED this 2 day of June, 1998.

BY THE COURT:

RAY M. HARDING, JUDGE

cc: David O. Leavitt, Juab County Attorney
Michael D. Esplin, Attorney for Defendant

ADDENDUM B

MEMORANDUM DECISION (August 18, 1998)

1359

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IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. CLARK ROY FRIESEN, Defendant.	**MEMORANDUM DECISION** CASE NO. 971400205 DATE: August 18, 1998 JUDGE: RAY M. HARDING DEPUTY CLERK: Georgia Snyder LAW CLERK: Dave Backman

This matter came before the Court upon Defendant's Motion for Reconsideration of Suppression and to Supplement the Record. The Court sees no reason to reconsider the decision to suppress evidence. Mr. Esplin's stipulation that Wyoming law requires a front license plate has no bearing on the Court's decision since it does not change the fact that the officer assumed and did not know that Wyoming requires two license plates. Having received and considered the Motion and the stipulation, the Court hereby denies the Motion.

DATED this 19 day of August, 1998.

BY THE COURT:

RAY M. HARDING, JUDGE

cc: David O. Leavitt, Juab County Attorney
Michael D. Esplin, Attorney for Defendant

ADDENDUM C

MOTION AND ORDER OF DISMISSAL

C

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FILED IN
4TH DISTRICT COURT
STATE OF UTAH
JUAB COUNTY

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Juab County Attorney
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Nephi, Utah 84648
Telephone: (435) 623-1141

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

JUAB COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

CLARK ROY FRIESEN,

Defendant.

MOTION AND ORDER OF DISMISSAL

Criminal No. 971400205

The State of Utah, through the Juab County Attorney, hereby moves the court to dismiss the above entitled action against the defendants on the ground that the suppression order will substantially impair the prosecution's ability to proceed in the case. *See State vs. Troyer*, 866 P.2d 528, 531 (Utah 1993). Therefore, the State moves to dismiss the above entitled case with prejudice.

Dated this 14th day of September, 1998.

David O. Leavitt
Juab County Attorney

ORDER

Based on the foregoing Motion and good cause appearing therefore, the Court hereby dismisses the above case.

Dated this 17 day of Sept, 1998.

District Judge

STATE OF UTAH)
) SS.
COUNTY OF JUAB)

I, the undersigned, Clerk of the Fourth District Court of Juab County, Utah, do hereby certify that the annexed and foregoing is a true and full copy of the original document on file in my office as such Clerk. Witnessed my hand and seal of said Court this 28th day of Sept, 1998

Assistant Clerk